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Supreme Court of the United States

October Term, 1943

No. 618

NEW SOUTHERN OHIO GAS COMPANY
and CHARLES EBERSBACH,
PETITIONERS.

v.

SYLVIA ROUSH, WILBUR ROUSH, EBER ROUSH,
SADIE ROUSH GRINDLEY, GEORGE ROUSH,
FLORA ROUSH, FLOSSIE ROUSH AND
LILLIAN ROUSH DURST.
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

The petitioner, New Southern Ohio Gas Company, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered on the twenty-first day of October, 1943, in the above entitled cause (R. 81).

Judgment Below

The decision of the court below is reported in 138 F. (2d) page 411.

Jurisdiction

This court has jurisdiction to review said decision under Section 240 of the Judicial Code (28 USCA #347).

This case presents an important question of general law, namely, does the rule of the Circuit Court of Appeals, applied in this case, deprive litigants in the Sixth Circuit of the full review accorded litigants in other circuits in appeals from decisions based upon undisputed facts or conclusions of law? The case has arisen over the construction, by the referee in a reopened bankruptcy case, of an order made June 26, 1936, in the same case by the former referee. The petitioners appealed and the Circuit Court of Appeals declined to disturb the referee's construction of said order on the ground that a referee's "*finding of fact* should not be disturbed for anything less than a demonstration of plain mistake" (R. 81).

We find that the ruling of the Circuit Court of Appeals that the *conclusion* of the referee was a *finding of fact,* and binding on the reviewing court, is in conflict with the doctrine announced by the Circuit Courts of Appeals for the Second, Third, Fifth, Seventh, Eighth and Ninth Circuits.

Questions Presented

The questions presented in this case may be stated in the form of the petitioners' claim, as follows:

1. The referee in bankruptcy, in determining the question submitted to him, was required to construe and to determine the legal effect of an order entered by a former referee (order of June 26, 1936, R. 8) and such construction, under the correct rule, (Second, Third, Fifth, Seventh and Eighth Circuits) is reviewable for the reason that it is not a "finding of fact" but a conclusion of law not binding upon the reviewing Court.

2. The rule in the Circuit Court of Appeals for the Sixth Circuit, applied in this case, is in conflict with the correct rule (Second, Fifth, Seventh, Eighth and Ninth Circuits) whether the referee's decision was a conclusion of law or finding of fact, because in either case the "finding" resulted in a miscarriage of justice, was based upon non-conflicting, documentary evidence, not involving any question of credibility or weight, and the appellate court was in as good a position to reach a correct conclusion as was the referee.

Note A. Questions 1 and 2 arise out of the decision of the Circuit Court of Appeals and are presented by this petition to the Supreme Court.

3. The intent and legal effect of the order of the District Court entered June 26, 1936, (R. 8) was to sell or "distribute" to petitioners the remaining assets of the bankrupt, including the bankrupt's interest in a certain oil and gas lease known as the Roush lease.

4. The respondents, the Roush heirs, are not proper parties in interest and have no right to object to the relief prayed for by the petitioners, to which no creditor has objected.

Note B. Questions 3 and 4 were presented to the Circuit Court of Appeals, not considered on the merits by that court, and therefore remain to be decided.

The questions thus presented may be stated as interrogatives, together with the correct answer as maintained by the petitioners, as follows:

1. Was the decision of the Circuit Court of Appeals, that the referee's conclusion was a finding of fact, in conflict with the decisions of other circuit courts of appeal? Yes.

2. Was the decision of the Circuit Court of Appeals, that it should not review the referee's finding, in conflict with the decisions of other circuit courts of appeals? Yes.

3. Was it the intent and effect of the order of June 26, 1936, to distribute to New Southern Ohio Gas Company all of the assets of Southern Ohio Gas Company, bankrupt, not previously sold to New Southern Ohio Gas Company? Yes.

4. Are the Roush heirs (respondents) proper parties in interest with a right to object to the relief asked for by petitioners, to which no creditor has objected? No.

STATEMENT

After notice to creditors (R. 6) the trustee in bankruptcy filed on June 26, 1936, a report of sale or "distribution of assets of the bankrupt" to the petitioner, New Southern Ohio Gas Company (R.7) a new corporation "ordered by the court to be formed for the purpose of acquiring the assets of the bankrupt". (R. 6). On June 26, 1936, the referee heard said report of distribution and confirmed said sale or "distribution" (R. 8). Among said assets was the lessee 7/8 working interest in the Roush lease, in which the Roush heirs, respondents, held the lessor 1/8 royalty interest (R. 10-12).

The bankruptcy case was thereupon closed and the new corporation took possession of all of the assets although no formal bill of sale nor assignment was executed. (R. 2).

(The respondents as well as the petitioners construed the order of June 26, 1936, as transferring said lessee interest in the Roush lease to petitioner, New Southern Ohio Gas Company (R. 13); and in 1941 the respondents requested the new company to drill a well on the premises (R. 14, 25, 26, 28) and told Roy Proffitt, a well drilling contractor, that the lease was owned by New Southern Ohio Gas Company (R. 22). Relying upon the respondents' request and representation, a gas well was drilled (R. 23, 14). Before the well was completed the Roush heirs denied (R. 16) the new company's ownership.)

On application of the petitioners the bankruptcy cause was reopened April 10, 1941, (R. 2) and the company of creditors and Charles Ebersbach, former trustee, applied for formal assignment and bill of sale of the assets from the bankrupt company to the new company (R. 10). The Roush heirs, *who were not creditors and had no interest in the question of title to assets of the bankrupt company,* filed a motion to vacate the order reopening the estate. The Court overruled the motion to vacate (R. 31) but the Roush heirs were permitted to continue as "parties" (R. 32) and eventually obtained about the same effect as if the motion to vacate had been sustained, because the referee, confirmed by the District Court, incorrectly construed the order of June 26, 1936, and the Circuit Court of Appeals incorrectly regarded such construction as a *finding of fact* and declined to review on the merits.

Rulings of the Court Below

June 26, 1936. The District Court made an order confirming distribution of "the assets of the bankrupt" (R. 7, 8) to New Southern Ohio Gas Company, "a corporation ordered by the court to be formed for the purpose of acquiring the assets of the bankrupt" (R. 6).

April 10, 1941. The District Court reopened the case, the court finding "that, although the referee intended the distribution of all the assets of the bankrupt by the transfer thereof to the new corporation and the new corporation actually took possession of all of the assets, yet there was no formal bill of sale nor assignment and certain assets of the estate were not fully administered" (R. 2); notwithstanding a very much later attempt by the court to delete said finding (R. 47).

December 31, 1941. The referee held that New Southern Ohio Gas Company was "not entitled to a conveyance of whatever interests the bankrupt may have had in the Roush lease" (R. 37).

December 14, 1942. The District Court confirmed the order of the referee (R. 47, 48).

October 21, 1943. The Circuit Court of Appeals declined to review on the merits, holding that the construction of the intent and legal effect of the order of June 26, 1936, was a *finding of fact,* and affirmed the order of the District Court (R. 81).

Reasons for Granting the Petition

The Circuit Court of Appeals held that the referee's order, filed December 31, 1941, construing the order of the former referee, filed June 26, 1936, was a finding

of fact. The decisions in *Bendix Home Appliances, Inc.* v. *Radio Accessories Company,* 8 Cir., 129 F. (2nd) 176, *Midwood Association, Inc.* v. *Commissioner of Internal Revenue,* 2 Cir., 115 F. (2d) 871, and other representative authorities cited in petitioners' brief, representing the weight of authority, hold that the construction of a writing is the determination of its meaning and legal effect and, therefore, is a conclusion of law not binding on a reviewing court.

The Circuit Court of Appeals further held that the "finding of fact" of the referee should not be disturbed for anything less than a demonstration of plain mistake, notwithstanding the fact that the record before the referee contained no conflict of evidence, involved no question of weight or credibility, and the "finding" resulted in a miscarriage of justice. The decisions *In re John Koke Co.,* 9 Cir., 38 F. (2d) 232, and *In Re Sullivan,* 7 Cir., 29 Fed. 66, and other representative authorities cited in petitioners' brief, representing the weight of authority, hold that an appellate court is not bound by findings of fact made on such a record, the reviewing judges being in as good a position as the referee to consider and determine undisputed facts. Furthermore, the appellate courts of other circuits hold that a full review will always be granted when necessary to prevent miscarriage of justice.

In the foregoing respects the decision of the Circuit Court of Appeals is in conflict with the great weight of authority with the result that, in the Sixth Circuit, appellants are wrongfully deprived of a review not only in all cases in which, as in the case at bar, a mere conclusion of law is erroneously designated as a "finding of fact", but also in all cases in which there is an actual finding of fact based upon documentary or undisputed

evidence not involving weight or credibility, and also in all cases where a review is necessary to prevent a miscarriage of justice. The Sixth Circuit rule violates the accepted principle of one trial and one review, because it denies a review on the merits in a very substantial class of cases.

For these reasons, it is respectfully submitted that this petition should be granted.

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